

<PAGE NAME="p.O-18">ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS
OPINION
No. 2000-O-05

DATE ISSUED: April 4, 2000

ISSUED TO: Central Cass Public School District Superintendent
Larry Gegelman

CITIZEN'S REQUEST FOR OPINION

On February 22, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Michael Geiermann asking whether the Central Cass Public School District violated N.D.C.C. §§ 44-04-19, 44-04-19.1, and 44-04-19.2 by holding an executive session to discuss contract negotiation strategy which was not authorized by law and by failing to follow the statutory procedures for holding an executive session.

FACTS PRESENTED

The Central Cass Public School District Board (Board) held a regular meeting on February 14, 2000, during which Mr. Geiermann addressed the Board on behalf of the Central Cass Education Association (CCEA) regarding the Board's contractual agreements with the District's teachers. In Mr. Geiermann's written request for permission to address the Board, he asked to "discuss with the board the concerns the CCEA has regarding the conclusion of the negotiation process" (Emphasis added).

Apparently, at the conclusion of contract negotiations between the CCEA and the Board last October, the superintendent of the District included a provision in the written agreement regarding personal leave. Personal leave was a major issue of dispute between the CCEA and the Board during the negotiation process. The District claims the provision was included by mistake. The CCEA claims the written agreement is enforceable, including the personal leave provision.

Later in the February 14 meeting, more than two hours after Mr. Geiermann addressed the Board, the Board convened in executive session. The executive session lasted 45 minutes and was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5). Mr. Geiermann's request for a copy of the recording under the open records law was denied by the District under N.D.C.C. § 44-04-19.2(5). The recording has been reviewed by this office.

<PAGE NAME="p.O-19">ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed during the executive session.
2. Whether the executive session of the Board was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSES

Issue One:

All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19.

Even if a governing body of a public entity has authority under state law to hold an executive session, the governing body still must comply with the procedural requirements in N.D.C.C. § 44-04-19.2. Included among these requirements is the need to announce the general topics to be discussed during the executive session and the legal authority for holding an executive session on those topics. N.D.C.C. § 44-04-19.2(2)(b).

2000 N.D. Op. Att'y Gen. O-1 (Jan. 24 to Donna Black Cloud). Under N.D.C.C. § 44-04-19.2(2)(b), a public entity must announce both the legal authority for the executive session and the topics to be discussed during the session. 1999 N.D. Op. Att'y Gen. O-20 (Apr. 22 to Greg Lange). However, a cite to a specific statute is not required, and the governing body is not required to reveal any closed or confidential information in its announcement. Id.

In support of its position that the announcement was sufficient, the Board makes three points: 1) Mr. Geiermann gave a fifteen minutes presentation on the contracts earlier during the same meeting; 2) the motion to go into executive session indicated the purpose was to "discuss the conclusion of negotiations;" and 3) after the open session was reconvened, a Board member announced that the Board supported the revised agreement issued on October 7, 1999. The announcement required by N.D.C.C. § 44-04-19.2 must be made before holding an executive session. Thus, the Board's third point regarding the announcement following the executive session is not helpful in reviewing the sufficiency of the announcement the Board was required to make prior to the executive session.

<PAGE NAME="p.O-20">For the Board's position to be correct, two inferences need to be drawn from what occurred during the meeting

The first inference is that the legal authority for the Board's executive session was the exception to the open meetings law in N.D.C.C. § 44-04-19.1 for meetings "to discuss negotiating strategy or provide negotiating instructions." Although it would have been preferable for the Board to cite the appropriate statute, or at least mention negotiation "strategy" or "instructions," the motion passed by the Board closely followed the applicable statutory language and provided reasonable notice of the statute the Board was relying on to close a portion of its meeting to the public.

The second inference is that the "negotiations" mentioned in the Board's motion pertained to the teacher contracts. Had the executive session occurred immediately following Mr. Geiermann's presentation, this might be a fair inference to make. However, as documented in the meeting minutes, the Board conducted a large amount of business between Mr. Geiermann's presentation at 7:55 p.m. and the executive session at 10:45 p.m. One could no longer assume that the "negotiations" mentioned in the motion pertained to the teacher contracts.

This office has previously concluded that an announcement of a closed "attorney consultation" is not sufficient if the announcement fails to identify the pending or reasonably predictable litigation to be discussed by the governing body. 1999 N.D. Op. Att'y Gen. at ¶24. For the same reason, it is my opinion that the Board's announcement did not sufficiently describe the topics to be considered during the executive session because it failed to identify the particular contract or contracts for which the Board was discussing negotiation strategy or providing negotiation instructions.

Issue Two:

"A meeting may not be closed [under N.D.C.C. § 44-04-19.1(7)] simply because a contract is being discussed." 1999 N.D. Op. Att'y Gen. 0-1, 0-2 (Feb. 22 to Howard Swanson).

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its . . . negotiator regarding . . . contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining . . . position of the public entity.

N.D.C.C. § 44-04-19.1(7) (emphasis added). The terms "strategy" and "instructions" are key terms which limit the application of N.D.C.C. <PAGE NAME="p.O-21">§ 44-04-19.1(7). In addition, the last sentence of this subsection authorizes an executive session "only if allowing the other party to the negotiation to listen to the discussion would

result in increased costs to the public entity." 1999 N.D. Op. Att'y Gen. at O-2. As a result, subsection 7 of N.D.C.C. § 44-04-19.1 does not authorize an executive session for a governing body to receive an update or summary from its negotiator on the status of contract negotiations. 1998 N.D. Op. Att'y Gen. O-66 (June 9 to Melvin Fischer and Lowell Jensen).

The first portion of the executive session, roughly 15 minutes in length, consisted of the superintendent providing information on the history of the contract negotiations between the Board and the teachers. This segment of the executive session concluded with the superintendent commenting "that's the timeline." The superintendent's presentation did not involve a discussion of negotiation strategy or instructions, and therefore was improperly closed to the public under N.D.C.C. § 44-04-19.1(7).

The balance of the executive session consisted of the Board members and superintendent discussing the appropriate position to take, and appropriate response to make, regarding the inclusion of the disputed personal leave provision in the written contracts. Although the Board members and the superintendent continued to refer to past events in the negotiation process, those remarks were made in the context of the Board's intent in signing the written agreement, which is an issue in the contract dispute over the personal leave provision. Even if negotiations had concluded regarding the written agreement, as Mr. Geiermann asserts, it was reasonable for the Board to conclude that additional negotiations were likely to occur in the immediate future as a result of the dispute over the personal leave provision. Allowing the CCEA's members or attorney to attend the session would have revealed the Board's legal position and strategy for further negotiations with the CCEA regarding the contract dispute, which would have an adverse fiscal effect on the Board's bargaining position.

Except for the presentation of the "timeline" at the beginning of the executive session, it is my opinion that the Board's executive session on February 14 was limited to topics which are authorized by N.D.C.C. § 44-04-19.1(7) to be considered in executive session.

CONCLUSIONS

1. The Board's announcement of the authority and topics to be discussed during the executive session was not sufficient under N.D.C.C. § 44-04-19.2.
2. Except for the beginning of the executive session, the Board's executive session was authorized by law and limited to the <PAGE NAME="p.O-22">authority and topics announced during the open portion of the meeting.

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STEPS NEEDED TO REMEDY VIOLATIONS

In light of the announcement by the Board members immediately following its executive session, no further remedial action is necessary to identify the legal authority and topics of discussion during the executive session. The Board must allow public access to the recording of the first part of its executive session, up to the point where the superintendent concludes "that's the timeline." The Board also must provide a copy of that section of the recording to Mr. Geiermann as he requested.

Failure to disclose a record or take other corrective measures as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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